SUPREME COURT OF THE UNITED STATES.

No. 36.

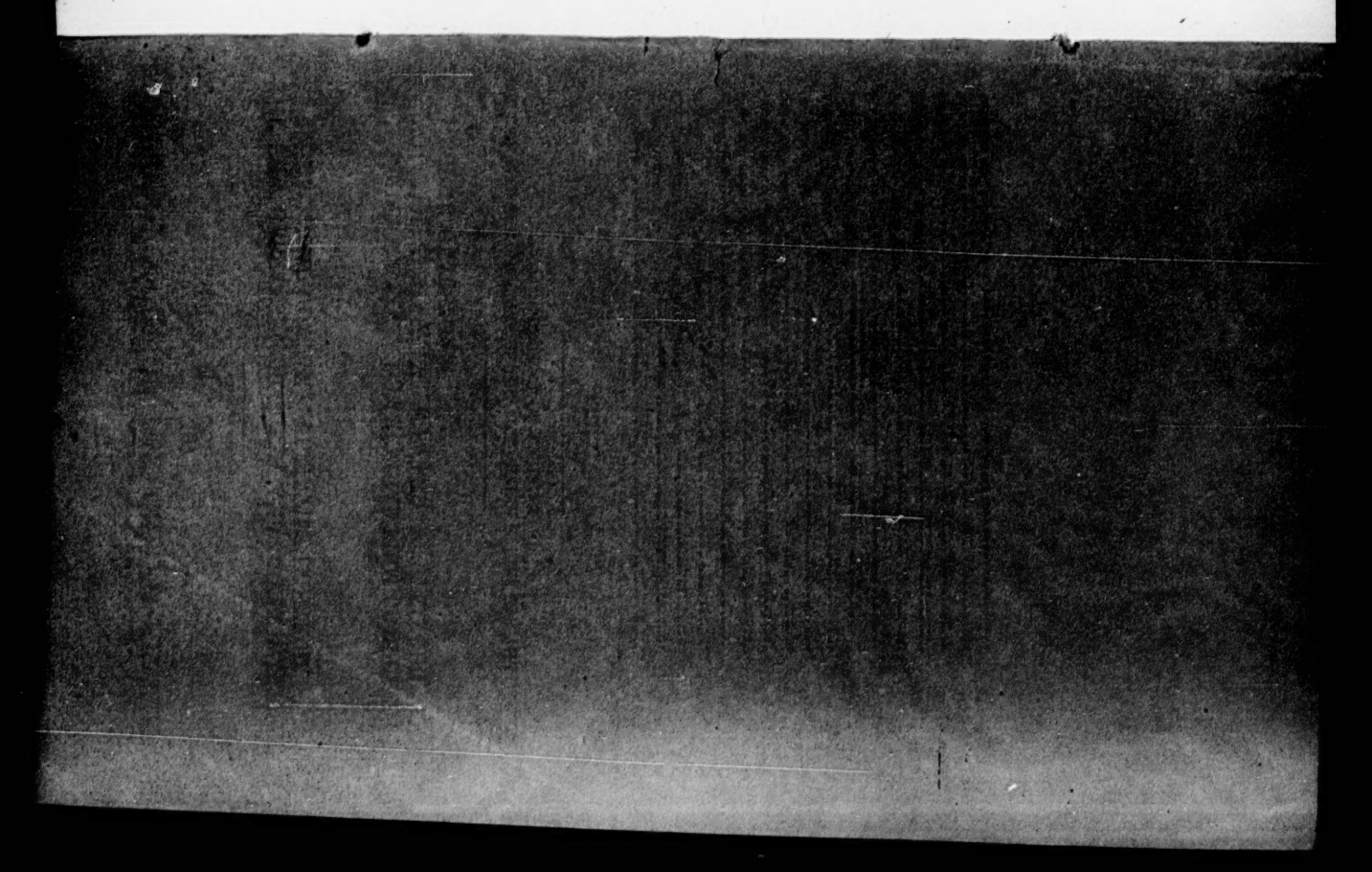
THE NEW ORLEANS, OPELOUSAS, AND GREAT WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

W. S. LINDSAY & CO., A COMMERCIAL FIRM COMPOSED OF WILLIAM S. LINDSAY, EDWARD P. STRINGER, AND GEORGE GLADSTONE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

GOVERNMENT PRINTING OFFICE.



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3 *Petition.—Filed 5th March*, 1859.

Circuit court of the United States, fifth circuit and eastern district of Louisiana.

To the honorable the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

The petition of W. S. Lindsay & Co., a commercial firm, domiciled at London, in England, and composed of William S. Lindsay, Edward P. Stringer, and George Gladstone, all aliens, subjects of the Queen of Great Britain, and residing in Great Britan, humbly shows:

That the New Orleans, Opelousas, and Great Western Railroad Company, a corporation established under the law of Louisiana, and having its domicil at New Orleans and the said State of Louisiana, is justly indebted unto your petitioners in the sum of eighteen thousand eight hundred and thirty-eight $\frac{98}{100}$ dollars, ($18,838 98) with legal interest thereon from the 15th May, 1857, for this:

By a written contract, entered into between these petitioners and the said railroad company, through its agents, Ambrose Lanfear and B. Fallon, at London, on the 12th September, 1853, the said company bound itself to pay petitioners freights at the rate of twenty-five shillings sterling per ton of 2,240 lbs., together with five per cent. primage, without regard to the rate that may be stipulated in the bills of lading (such freight and primage to be calculated at the exchange of $4 80 per pound sterling), in consideration of freightage to be furnished by petitioners to Algiers, opposite New Orleans, for all the rails which Messrs. Guest & Co. and Messrs. Thompson & Foreman were under obligations to ship to New Orleans, for account of the said New Orleans, Opelousas, and Great Western Railroad Company.

Now your petitioners show that, in pursuance of the aforesaid contract, they furnished freightage for 12,013 1 1 tons of rails, which were thus transported from Wales to Louisiana, and delivered to the said company, and that the balance of freight upon said rails due to your petitioners, under the contract aforesaid, over and above the freight stipulated in the bills of lading, and paid by the consignees, amounted, on the 15th day of May, 1857, to the sum of £3,924 15 8 sterling, or, in exchange, as stipulated by contract, to the sum of $18,838 98 dollars, all which will more fully appear by the ac-

4 count hereto anaexed and made part hereof; which account has been rendered to said company, and acknowledged to be correct in itself, but payment thereof has been procrastinated, and finally refused, upon the pretext that the said railroad company has a larger demand in offset thereto, in the way of damages claimed of your petitioners, which demand is unfounded and frivolous.

Wherefore they bring suit, and pray that the said company, through its president, William G. Herres, of New Orleans, be cited to answer this petition, and after a hearing, condemned by the judgment of your honorable court to pay petitioners the aforesaid sum of $18,838 98,

6 *Exception, answer, and reconventional demand.—Filed 30th March*, 1859.

U. S. circuit court.

LINDSAY & Co.
v.
THE N. O., OPELOUSAS AND GREAT WESTERN R. R. Co. } No. 3,060.

And now the defendants come into court by their attorneys, and by way of peremptory exception to the plaintiffs' petition plead specially the prescription of one and three years, and pray to be hence dismissed, without further answer herein, and with their costs.

And in case the said exceptions be overruled, but not otherwise, then for answer to the said petition, they deny all and singular the allegations thereof, except such as are hereinafter specially admitted.

And for further answer they say they admit they executed the contract in the petition mentioned, and dated the 12th of September, 1853; but they deny they are in anywise indebted to the plaintiffs by reason thereof.

They aver that the said plaintiffs have failed to perform the stipulations by them undertaken to be performed by the said contract; and specially they charge the said plaintiffs did not furnish, when required, freightage to Algiers, opposite New Orleans, for the rails to be shipped by Thompson & Foreman, in said contract mentioned. They allege that, by the terms of the agreement between these defendants and the said Thompson & Foreman, the latter sold to these defendants, and undertook to have ready for shipment at Newport or Cardiff, in Wales, in the kingdom of Great Britain, eight thousand tons of railroad iron, at the times and in the quantities as follows, to wit: on or before the first of November, 1853, from thirteen to fifteen hundred tons; on or before the first of December, 1853, from thirteen to fifteen hundred tons; a like quantity on or before the first of January, 1854; a like quantity on or before the first of February, 1854; a like quantity on or before the first of March, 1854; and a like quantity on or before the first of April, 1854. These defendants further allege that the contract for freightage between them and the plaintiffs was made subsequently to the said contract of purchase from Thompson & Foreman, of the terms and conditions of which the said plaintiffs had full knowledge, and was entered into in order to provide transportation to this State of the rails so purchased as aforesaid; that the said Thompson & Foreman made due delivery to the plaintiffs herein of the eight thousand tons of rails, according to the terms and tenor of their contract with these
7 defendants as aforesaid, and that thereupon it became the duty of the plaintiffs to provide freightage therefor to Algiers, opposite the city of New Orleans; but the said plaintiffs, not mindful of their duty in the premises, did, for an unreasonable time, and against the wishes and instructions of these defendants, delay the shipment

of the rails so received as aforesaid, whereby great loss has accrued to these defendants; that, by the terms of the contract with the plaintiffs, they were to provide vessels of the description mentioned in the contract, and were to charge freight at the rate of twenty-five shillings sterling per ton, together with five per cent. primage, without regard to the rate that might be stipulated in the bill of lading; that for the purpose and with the view of profiting, as much as possible, by the said contract with these defendants, and in anticipation of a fall in the price of freight, the said plaintiffs designedly postponed and delayed procuring vessels for the freightage aforesaid; that the detention and delay in the shipment of the said eight thousand tons of rails amounted to the full period of two hundred and sixty-six days, and that these defendants have suffered damage thereby in the full sum of eighteen thousand dollars.

These defendants further aver that the plaintiffs, contrary to the conditions of the said contract for freightage, and without the consent of these defendants, delivered and discharged large quantities of the said rails at New Orleans, instead of at Algiers opposite thereto, as they were bound to do, and that these defendants were put to heavy expense, to wit, in the sum of ten thousand dollars, by reason thereof, and in order to have the said rails transported to Algiers; all of which will more fully appear by the detailed statement hereto annexed, marked A, and prayed to be made part of this answer. They pray to be dismissed with costs. And now the defendants, assuming the characters of plaintiffs, in reconvention, allege as they have above set forth in their answer; they pray that the said plaintiffs be cited to appear and answer this reconventional demand, and that after due proceedings they be condemned to pay reconvenors the sum of twenty-eight thousand dollars damages by reason of the premises. They pray for costs, and for trial by jury, and for general relief.

M. M. COHEN, *for himself*,
And BONFORD, SINGLETON & CLARK,
Of Counsel for Def'ts, Int'v'rs.

8 *Statement A.—Filed with answer.*

For charges and expenses on iron incurred by company on sundry cargoes landed in New Orleans, instead of Algiers as per contract:

1854.			
Apr. 17.	Per Old England, 128 tons:		
	Transportation to Algiers, at 2 dollars per ton	$256 00	
	Interest on same from July 6th, 1854, when paid, to date, 2 years 313 days	44 13	
			300 13

April 17.	Per Cynosure, 200 tons:		
	Transportation to Algiers ... $309 00		
	Paid drayage on same 200 00		
		509 00	
	Interest June 12, 1854, to date, 2 years 337 days	89 67	
			598 67
Apr. 26.	Per Houghton, 85 tons:		
	Paid drayage and storage on same ..	258 00	
	Interest August 30, 1854, to date, 2 years 258 days	42 08	
			300 08
May 3.	Per J. M. Wood, 285 tons. Taken from warehouse 1st August, 1855:		
	Storage $1,070 62		
	Drayage 358 05		
	Making 1,428 67		
	Nov. 15, 1854, paid on account of above amount	1,040 05	
	Interest to date, May 15, 1857, 2 years 181 days	156 18	
	August 18, 1855, paid balance of account	388 62	
	Interest to date, 1 year 270 days ..	37 20	
			1,622 05
	Per E. A. Clark, 130 tons. Taken from warehouse 1st July, 1855:		
9	Paid storage, $4 55; drayage, $140 .	595 00	
	Interest 1st July, 1855, to date, 1 year 319 days	67 33	
			662 33
May 22.	Per Sultan, 106 tons:		
	Transportation to Algiers	212 00	
	Interest July 6th, 1854, to date, 2 years 313 days	36 49	
			248 49
	Amount forward		3,731 75
	Amount forward		3,731 75
1854.			
June 16.	Per Germanicus, 13 tons. Taken from warehouse August 1st, 1855:		
	Paid storage, $45 50; drayage, $14 30	59 80	
	Interest August 1st, 1855, to date, 1 year 288 days	6 46	
			66 26

June 25.	Per James Titcomb, 371 tons:			
	Paid drayage August 3, 1854		371 00	
	Interest to date, 2 years 285 days		62 14	
	Transhipment 3d July, paid same date		556 00	
	Interest 3d July, 1854, to date, 2 years 316 days		96 00	
				1,085 14
July 3.	Per Clara Wheeler, $100\frac{7}{10}$ tons. Taken from warehouse August 1st, 1855:			
	Paid storage, $327 27; drayage, $110 77		438 04	
	Interest August 1st, 1855, to date, 1 year 288 days		47 30	
				485 34
July 7.	Per Milan, 278 tons:			
	November 15th, 1854, paid dray and storage		708 90	
	Interest to date, 2 years 181 days		106 45	
10	October 2d, 1854, paid storage		556 00	
	Interest to date, 2 years 164 days		81 92	
				1,453 27
July 31.	Per Idas, 305 tons 13 cwt.:			
	Septem. 29, 1854, paid on account of drayage	$336 60		
	Septem. 29, 1854, paid on account of labor	38 25		
	Septem. 29, 1854, paid on account of storage	229 50		
			604 35	
	Interest to date, 2 years 228 days		95 48	
	June 27th, 1855, paid on account of storage		612 00	
	Interest to date, 1 year 322 days		69 57	
	July 1st, 1855, taken from warehouse:			
	Paid storage $128; cartage, $253		381 00	
	Interest to date, 1 year 319 days		43 11	
				1,805 51
1855.				
July 7.	Paid for assorting iron in warehouse of cargo J. M. Wood		31 50	
	Interest to date, 1 year 312 days		3 52	
	Amount forward			8,662 29

	Amount forward			8,662 69
1856.				
June 6.	Paid hauling iron, 25 tons, cargo Idas; paid hauling iron, 36 T., cargo Clark, from warehouse to levee	77 50		
	Interest to date, 1 year 111 days	6 08		
			83 58	
11	May 10. Paid assorting in warehouse and hauling to levee 209 tons cargo J. M. Wood	229 90		
	Interest to date	13 99		
			243 89	
				8,989 76

Trial of cause.—April term, 1860.

NEW ORLEANS, *Friday*, 1*st June*, 1860.

Court met pursuant to adjournment. Present Hon. J. A. Campbell, presiding judge. Present Hon. Theo. A. McCaleb, district judge.

LINDSAY & Co.
v.
NEW ORLEANS, OPELOUSAS, AND GREAT WESTERN R. R. Co. } 3,060.

This cause was called for trial, Messrs. Spofford & Bradford appearing for the plaintiffs, and Messrs. Cohen & Bonford for the defendants; whereupon the trial by jury was waived, and the cause taken up for trial before the court, and proceeded in until 3 o'clock p. m.; whereupon it was ordered that it be continued until to-morrow, at 10 o'clock a. m.

Trial and submission of cause.—April term, 1860.

NEW ORLEANS, *Saturday*, 2*d June*, 1860.

Court met pursuant to adjournment. Present Hon. J. A. Campbell, presiding judge. Present Hon. Theo. H. McCaleb, district judge.

LINDSAY & Co.
v.
NEW ORLEANS, OPELEOUSAS, AND GREAT WESTERN R. R. Co. } 3,060.

The trial of this cause was resumed and argued by Messrs. Spofford and Bradford for the plaintiffs, and by Messrs. Cohen and Bonford for the defendants, and submitted to the court.

12 *Opinion and statement of case.—Filed 4th June*, 1860.

Circuit court of the United States, eastern district of Louisiana.

W. S. LINDSAY & Co.
v.
THE NEW ORLEANS, OPELOUSAS, AND GREAT Western Railroad Co.

This cause came on to be heard by the court upon pleadings and proofs, and was argued by counsel for both parties, and the court, upon consideration of the proofs, find the following facts:

1. That the plaintiffs are partners, and at the date of the transactions hereafter specified were ship brokers in London, Great Britain. The defendants are a corporation existing by the law of Louisiana.

2. That the parties respectively executed an agreement, filed as testimony in this cause and made a part of the record, bearing date in London, 12th September, 1853, by which the plaintiffs engaged to furnish, when required, freightage to Algiers, opposite to New Orleans, for all the rails which Messrs. Guest & Co. and Messrs. Thompson & Foreman are under engagements to ship to New Orleans to the defendants; and the defendants agreed to pay, on delivery of said rails at Algiers, freight for the same, at the rate of twenty-five shil lings sterling per ton of 2,240 pounds, with five per cent. primage, without regard to the freight stipulated in the bills of lading—the pound sterling to be estimated at $\$4\frac{80}{100}$.

3. That the firm of Thompson & Foreman agreed to supply at Cardiff or Newport, in Wales, 8,000 tons of rails, between the 1st November, 1853, and 1st April, 1854, at the beginning of each month, in quantities from 1,300 to 1,500 and 1,000 tons, as shown in the contract filed as evidence, and were to be paid one-half the price the 1st August, 1854, and one-half the 1st October, 1855, with interest from the date of the shipment (bills of lading) at the rate of six per cent. per annum.

4. That the plaintiffs did transport, for the account of the defendants, and did deliver at the port of New Orleans, eight thousand and six tons of rails, under this agreement, and also other rails, as shown in their account, and have received payment in part therefor; and that there was due to them, under the contract, according to their account current, rendered and received by the defendants, the sum of £3,924 15*s.* 8*d.* of the 15th May, 1857.

5. That the defendants resist the payment of this sum because, they say, that the contract was not duly performed in reference to the time and place of delivery of the railroad iron; and the court find that there was not freightage supplied for the shipment for more than 3,068 tons of the iron, from November, 1853, till the 6th Jan-
13 uary, 1855, and that the remainder of 4,932 tons of this iron were shipped between the 6th January, 1855, and 15th April, 1855. The defendants claim that there was a delay of two hundred and seventy-seven days of six thousand one hundred and fifteen tons, from the period of its delivery at Cardiff till its shipment for New

Orleans, and that they are entitled to compensation in the sum of $13,866 08, the interest on cost of the iron at 6 per cent.

6. The court find that the circumstance of a delay on the part of the plaintiffs was made the subject of observation by the defendants in the summer of 1854, and that in the month of September of that year the plaintiffs agreed to pay to the defendants, upon the completion of the shipments, £800 (eight hundred pounds,) in full of all the claims on the contracts made with them, and that an extension was allowed until the 31st of December, 1854.

7. The objection to the admissibility of this evidence, under the pleadings, was waived by the plaintiffs' counsel, and its competency admitted.

7. The court further find that the defendants refused to receive the cargoes of iron shipped subsequently to the 31st December, 1854, upon their arrival at New Orleans, at various dates between the 6th of January, 1855, and June, 1855, and that Thompson & Foreman, under an agreement with them, resumed the possession and ownership thereof, allowing a credit to the said defendants on their debt for the assessed value of the iron at the port of New Orleans, and the said defendants waived the tender of such as had not been then tendered.

8. The defendants have not proved to the court any special damage as resulting from the delay complained of. It is shown that the defendants had an abundance of railroad iron for the laying of the track, and were not delayed in consequence of this default. It has not been shown that they desired to sell the iron, or, if so, that the plaintiffs were informed thereof; nor that there was any change in the market values of iron at the different dates; nor was it shown that they had suffered from the absence of this iron in the credit of the company.

9. The court find that the delay on the part of the plaintiffs was attributable to the demand for vessels arising from the war between Great Britain and France and Russia, and the consequent rise in freights; and that but for the delay the plaintiffs would probably have suffered a heavy loss, and that by the delay the bargain has resulted in a profit if this recovery is made, the payments made by the company being the amount called for by the bills of lading from London.

10. That the delivery of the cargoes at New Orleans instead of Algiers was a violation of the terms of the agreement, and subjected the defendants to expenses. That this claim is not concluded by the settlement with O'Fallen in London, that settlement referring only to the delay that had occurred in the completion of the contract. These expenses consist of the actual expenses in transporting the cargoes of the Old England, Cynosure, and Sultan to Algiers, and a corresponding allowance for the iron accepted in New Orleans, and stored there until sold or disposed of. The court disallows the account for storage, drayage, and other expenses referred to in the account filed.

11. The court is of opinion that this contract is not a contract for the payment of the freight of ships and other vessels within the 3499th article of the civil code.

12. The court, upon consideration of the contract between the parties, the account rendered in May, 1857, by the plaintiffs to the defendants, the letters between the plaintiffs and defendants relative thereto, and the accounts offered in evidence as made out by the defendants, giving a credit to the plaintiff for the amount of their account, and the statute of the State prescribing open accounts in three years, overrule the exception of three years.

13. The court upon the whole case determines that the law and the facts are in favor of the plaintiffs, and directs the clerk to make up the account, allowing the plaintiffs for the whole amount of freightage at the rates specified in the contract; allowing to the defendants credit for all payments acknowledged on the account current of the plaintiffs dated in May 15, 1857; also £800 for the delay, as stated in the agreement of September 1854; also for the drayage and transportation of the cargoes of the Old England, Cynosure, and Sultan from New Orleans to Algiers, and at the same rate for expenses of the Houghton, Wood, E. A. Clark, Germanicus, Clara Wheeler, James Titcombe, Milan, and Idas; that is, at the same rate assuming that they had been transported. For it appears that the defendants would not have been subject to warehouse expenses at Algiers, and were so in New Orleans, and that the delivery in New Orleans was in other respects a damage to the defendants. Those expenses incurred in New Orleans are greater than the transportation.

14. The interest will be calculated from the completion of the shipments, at the rate of six per cent. upon the plaintiffs' demand.

NOTE.—The figure "5" stricken out and "six" substituted by order of court. J. W. G.

Order of reference, April term, 1860.

NEW ORLEANS, *Monday, 14th June,* 1860.

Court met pursuant to adjournment. Present, Hon. J. A. Campbell, presiding judge. Present, Hon. Theo. H. McCaleb, district judge.

15	LINDSAY & Co. *v.* NEW ORLEANS, OPELOUSAS, AND GREAT WESTERN R. R. Co.	3,060.

The court this day delivered its opinion in writing in this cause, and made reference thereof to the clerk to ascertain, under instructions given in its opinion, the amount of the judgment to be rendered.

Report on reference.—Filed 12th June, 1860.

U. S. circuit court, eastern district of La.

W. S. LINDSAY & CO.
v.
NEW ORLEANS, OPELOUSAS, AND G. W. R. R. Co. } 3,060.

Balance due plaintiffs on 15 May, 1857, as per acc't		$18,838 96
Six per cent. int. per annum thereon from 15th May, 1857, to 15 June, 1860, 3 yrs. and 1 mo.....		3,485 21
		22,324 17
Cost as per acc't W. of transporting from New Orleans to Algiers the cargoes of the Old England, Cynosure, and Sultan, amounting together to 434 tons, $977 00, averaging $2 25 per ton. This, under the decree of the court, is assumed to be the cost of transporting the cargoes of the other vessels. It results thus:		
Old England, 128 tons; Cynosure, 200 tons; Sultan, 106 tons—434, at $2 25.....	$977 00	
Houghton, 85 tons.....	191 25	
J. M. Wood, 285 tons	641 25	
E. A. Clark, 130 tons	292 50	
Germanicus, 13 tons	29 25	
Jas. Titcomb, 371 tons.....	834 75	
Clara Wheeler, $100\frac{7}{10}$ tons.....	226 55	
Milan, 278 tons.....	625 50	
Idas, 305 tons, 13 cwt.....	688 15	
Cost of transportation.....	4,506 20	
16 Add £800 for delay, as per agreement Sept., 1854	3,840 00	
	8,346 20	
Add 5 yrs. and ½ mo. int. at 6 per cent. per annum	2,528 90	
		10,875 10
Balance due plaintiff, 15 June, 1860.....		11,449 07

Respectfully submitted.

J. W. GURLEY, *Clerk.*

New Orleans, 12 June, 1860.

Account W., annexed to report.

Messrs. Lindsay & Co., London, in account with the New Orleans, Opelousas, and G. W. R. R. Co., Dr.:

For interest on cost of 8,000 T. R. R. iron at $49 12 per ton, say $392,960 00, from 15th January to 8th October, 1854, at 6 per cent. per annum, as per statement annexed.....	$17,421 22

For charges and expenses on iron, incurred by company, on sundry cargoes landed in New Orleans, instead of Algiers as per contract:

1854.				
Apr. 17.	Old England, 128 tons:			
	Transportation to Algiers, at $2 00 per ton		$256 00	
	Interest on same from July 6th, 1854, when paid, to date, at 6 per cent., 2 yrs. 313 days		44 13	
				300 13
Apr. 17.	Cynosure, 200 tons:			
	Transportation to Algiers	$309 00		
	Drayage on same	200 00		
			509 00	
	Int., June 12th, 1854, to date, 2 years 337 days		89 67	
				598 67
17	Apr. 26. Houghton, 85 tons:			
	Drayage and storage on same.		258 00	
	Int. Aug. 30th, 1854, to date, 2 years 258 days		42 08	
				300 08
May 3.	J. M. Wood, 285 tons. Sold Dennistown & Co., 1st August, 1855:			
	Storage		1,070 62	
	Drayage		358 05	
	Making		1,428 67	
	Nov. 15th, 1854, paid on account of above		1,040 05	
	Interest to date, 2 years 181 days		156 18	
	Aug. 18th, 1855, paid balance of account		388 62	
	Interest to date, 1 year 270 days		37 20	
				1,622 05
May 3.	E. A. Clark, 130 tons:			
	Storage		455 00	
	Drayage		140 00	
			595 00	
	Int. 1st July, 1855, to date, 1 year 319 days		67 33	
				662 33
	Amount forward			20,904 48

1854.			
	Amount forward		20,904 48
May 22.	Sultan, 106 tons:		
	Transportation to Algiers	212 00	
	Int. July 6, 1854, to date, 2 years 313 days	36 49	
			248 49
June 16.	Germanicus, 13 tons. Sold Boorman, Johnson & Co., Aug. 1st, 1855:		
	Storage	45 50	
	Drayage	14 30	
		59 80	
	Interest Aug. 1st, 1855, to date, 1 year 288 days	6 46	
			66 26
18	June 25. James Titcomb, 371 tons:		
	Paid drayage Aug. 3d, 1854.	371 00	
	Interest to date, 2 years 285 days	62 14	
	Transhipment 3d July, payment same date	556 00	
	Interest 3d July, 1854, to date 2 years, 316 days	96 00	
			1,085 14
July 3.	Clara Wheeler, $100\frac{7}{10}$ tons. Sold Boorman, Johnston & Co., Aug. 1st, 1855:		
	Storage	327 27	
	Drayage	110 77	
		438 04	
	Interest Aug. 1st, 1855, to date, 1 year 288 days	47 30	
			485 34
July 7.	Milan, 278 tons:		
	Nov. 15th, 1854, paid drayage and storage	708 90	
	Interest to date, 2 years 181 days	106 45	
	Oct. 2d, 1854, paid storage	556 00	
	Interest to date, 2 years, 164 days	81 92	
			1,453 27
July 31.	Idas, 305 tons 13 cwt.:		
	Sept. 29th, 1854, paid on account drayage	336 60	
	Sept. 29th, 1854, paid on account labor.	38 25	
	Sept. 29th, 1854, paid on account storage	229 50	
		604 35	

July 31.	Interest to date, 2 years 228 days	95 48		
	June 27th, 1855, paid on account storage	612 00		
	Interest to date, 1 year 322 days	69 57		
	July 1st, sold Denistown & Co			
	Paid them storage	128 00		
19	Cartage, $253, (Blakesley)	381 00		
	Interest to date, 1 year 319 days	43 11		
				1,805 61
	Amount forward			26,048 49
	Amount forward			26,048 49
1855.				
July 7.	Paid for assorting iron, in warehouse, of cargo J. M. Wood	31 50		
	Interest to date, 1 year 312 days	3 52		
				35 02
1856.				
Jan. 6.	Paid hauling iron, 25 T., cargo Idas; paid hauling iron, 36 T., cargo Clark, from warehouse to levee	77 50		
	Interest to date, 1 year 111 days	6 08		
				83 58
May 10.	Paid assorting in warehouse and hauling to levee 209 T., cargo J. M. Wood	229 90		
	Interest to date, 1 year 5 days	13 99		
				243 89
				26,410 98
1857.				
	Less amount account rendered by W. S. Lindsay & Co			18,838 96
May 15.	Balance due R. R'd Co			7,572 02
	Interest on balance to May 15th, 1858			454 32
	Amount due R. R'd			8,026 34

20 *Order confirming report, April term*, 1860.

NEW ORLEANS, *Tuesday, 12th June*, 1860.

Court met pursuant to adjournment. Present, Honorable J. A. Campbell, presiding judge. Absent, Honorable Theo. H. McCaleb, district judge.

W. S. LINDSAY & Co.
v.
NEW ORLEANS, OPELOUSAS, AND GREAT WESTERN R. R. Co. } 3,060.

The clerk this day presented his statement of the amount found to

be due the plaintiff, under the directions given by the court in this cause. Whereupon it was ordered that the same be adopted, and that judgment be entered in conformity thereto.

Judgment.

Circuit court of the United States, fifth circuit and eastern district of Louisiana, April term, 1860.

NEW ORLEANS, *Tuesday, 12th June*, 1860.

Court met pursuant to adjournment. Present, Honorable J. A. Campbell, presiding judge. Absent, Honorable Theo. H. McCaleb, district judge.

W. S. LINDSAY & Co.
v.
NEW ORLEANS, OPELOUSAS, AND GREAT WESTERN R. R. Co. } 3,060.

The court having considered this case, and being of opinion that the law and the evidence are in favor of the plaintiffs, doth now, by reason thereof, order and adjudge and decree that the plaintiffs, W. S. Lindsay & Co., do have and recover judgment against the defendants, the New Orleans, Opelousas, and Great Western Railroad Company, for the sum of eighteen thousand eight hundred and thirty-eight dollars and ninety-six cents ($18,838 96,) with interest thereon, at the rate of six per cent. per annum, from the 15th day of May, 1857, until paid, and costs of suit; this judgment to be credited with the sum of eleven thousand four hundred and forty-nine dollars and seven cents, allowed the defendants upon their reconventional demand.

Judgment rendered 12 June, 1860.

21 Judgment signed 14 June, 1860.

J. A. CAMPBELL,
Associate Justice S. C. U. S.

Petition for writ of error.—Filed 6th June, 1860.

To the honorable the judges of the circuit court of the United States in and for the fifth circuit and eastern district of Louisiana:

The petition of the New Orleans, Opelousas, and Great Western Railroad Company humbly showeth that they are advised and believe that there is error to their prejudice in a certain final judgment rendered by this honorable court on the 14th day of June, 1860, wherein W. S. Lindsay & Co. are plaintiffs and these petitioners are defendants, being No. 3,060 of the docket of this honorable court, and that they are aggrieved thereby, and desire leave to take a writ of error, which may operate as a supersedeas, therefrom to the Supreme Court of the United States.

Wherefore petitioners pray for a writ of error operative as a supersedeas from said final judgment to the Supreme Court of the United States on their giving due bond and security, conditioned as the law directs, and otherwise complying with all legal requirements.

And petitioners pray for general relief.

M. M. COHEN and
BONFORD, SINGLETON & CLARK,
Attorneys for Defendants.

Bond for writ of error.—Filed 20th June, 1860.

Know all men by these presents that we, the New Orleans, Opelousas, and Great Western Railroad Company, as principal, and J. M. Lapeyre, A. Chiapella, Ambroise Lanfear, and R. Geddes, as securities, are held and firmly bound unto W. S. Lindsay & Co. in the full and just sum of eighteen thousand dollars, to be paid to the said W. S. Lindsay & Co., their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals and dated this twentieth day of June, in the year of our Lord one thousand eight hundred and sixty.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, at the city of New Orleans, in a suit depending in said circuit court, wherein W. S. Lindsay & Co. are plaintiffs, and the New Orleans, Opelousas, and Great Western R. R. Company are defendants, judgment was rendered against the said New Orleans, Opelou-
22 sas, and Great Western Railroad Company, the defendants, and the said New Orleans, Opelousas, and Great Western R. R. Company having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said W. S. Lindsay & Co., citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now the condition of the above obligation is such that if the said New Orleans, Opelousas, and Great Western Railroad Company shall prosecute their writ to effect, and pay such judgment as may be rendered against them, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

WILLIAM G. HEWES, [L. S.]
Preident N. O., Opelousas, and G. W. R. R. Co.
J. M. LAPEYRE. [L. .S]
A. CHIAPELLA. [L. S.]
AMB'SE LANFEAR. [L. S.]
R. GEDDES. [L. S.]

Sealed and delivered in presence of—
M. M. COHEN.

Approved. THEO. H. McCALEB, *U. S. Judge.*

Circuit court of the United States, fifth circuit and eastern district of Louisiana, clerk's office.

I certify that the foregoing twenty-nine pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had in the case of W. S. Lindsay & Co. *v.* The New Orleans, Opelousas, and Great Western Railroad Company, No. 3,060 of the docket.

Witness my hand and seal of the said court, at New Orleans, this 29th August, 1860.

[SEAL.] J. W. GURLEY, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the eastern district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you, or one of you, between W. S. Lindsay & Co., a commercial
23 firm, composed of William S. Lindsay, Edward P. Stringer, and George Gladstone, and the New Orleans, Opelousas, and Great estern Railroad Company, a corporation established under the laws of Louisiana, and having its domicil at New Orleans, in the said State, a manifest error hath happened, to the great damage of the said New Orleans, Opelousas, and Great Western Railroad Company, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct their error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this 20th of June, in the year of our Lord one thousand eight hundred and sixty.

J. W. GURLEY,
Clerk of the United States Circuit Court for Eastern District of Louisiana.

Indorsed: United States circuit court, No. 3,060. New Orleans, Opelousas, and Great Western Railroad Co. *v.* W. S. Lindsay & Co. Writ of error.

Filed 20th June, 1860.

J. W. GURLEY, *Clerk.*

THE UNITED STATES OF AMERICA, *Eastern District of Louisiana:*

The President of the United States to W. S. Lindsay & Company, a commercial firm, composed of William S. Lindsay, Edward P. Stringer, and George Gladstone, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the fifth circuit and eastern district of Louisiana, wherein the New Orleans, Opelousas, and Great Western Railroad Company, a corporation established under the laws of the State of Louisiana, and having its domicil in New Orleans, in said State, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties it that behalf.

Witness the honorable Roger B. Taney, Chief Justice of
24 the Supreme Court of the United States, this twentieth day of June, in the year of our Lord one thousand eight hundred and sixty.

THEO. H. McCALEB, *U. S. Judge.*

Indorsed: United States circuit court, No. 3,060. New Orleans, Opelousas, and Great Western Railroad Company *v.* W. S. Lindsay & Co., in error. Citation.

Marshal's return.

Received, June 20th, 1860, and on the same day served a copy of the within on H. M. Spofford, esq., attorney, personally, at his office in this city. Returned, June 20th, 1860.

JAMES GILLAN, *Deputy U. S. Marshal.*

SUPREME COURT OF THE UNITED STATES.

No. 36.—December Term, 1866.

THE NEW ORLEANS, OPELOUSAS, AND GREAT WESTERN RAILROAD COMPANY

vs.

W. S. LINDSAY AND CO.

Certiorari and return.—Filed 19th September, 1866.

1 The United States of America, *ss.*

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of Louisiana, greeting:

Whereas, in a certain suit in said circuit court, between W. S. Lindsay & Co., a commercial firm composed of William S. Lindsay, Edward P. Stringer, and George Gladstone, plaintiffs, and the New Orleans, Opelousas, and Great Western Railroad Company, defendant, which suit was removed to the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"That it appears by the transcript filed in this court that the plaintiffs below sued upon a certain written contract between them and the defendants below, upon which said written contract the said suit depended, in whole or in part, and which said contract is material to be considered upon this writ of error; but the said written contract nowhere appears in or by the transcript here filed, the same having been apparently omitted through accident or inadvertence;"

You, therefore, are hereby commanded that, searching the records and proceedings in said cause, you certify what omissions and errors you shall find to the said Supreme Court of the United States,

2 so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this twenty-ninth day of March, A. D., 1866.

[SEAL.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

Issued 27th July, A. D. 1866.

3 *Memorandum of agreement between W. S. Lindsay & Co., of London, and the New Orleans, Opelousas, and Gt. Western Railroad Company, represented, under a power of attorney, by Ambrose Lanfear and B. Fallon.*

W. S. Lindsay & Co., in consideration of the freight hereinafter stipulated, engage to furnish, when required, freightage to Algiers, opposite New Orleans, for all the rails which Messrs. Guest & Co. and Messrs. Thompson & Forman are under engagements to ship to New Orleans for account of the New Orleans, Opelousas and Gt. Western Railroad Company.

The vessels to take the rails to be shipped by Messrs. Guest & Co. to be A 1 American vessels, and those to take the rails to be shipped by Messrs Thompson & Forman to be either A 1 American or British, or any other not ranking lower than A 2 in the United States, insurable at the same premium as A 1 vessels, and that shall be satisfactory to Messrs. Thompson & Forman.

And in consideration of such freightage, the New Orleans, Opelousas, and Gt. Western Railroad Company engage to pay on delivery of said rails at Algiers, freight for the same, at the rate of twenty-five shillings sterling per ton of 2,240 pounds, together with five per cent. primage, without regard to the rate that may be stipulated in the bills of lading, such freight and primage to be calculated at
4 the exchange of $4 80 per pound sterling.

London, 12 Sept., 1853.

(Signed in duplicate.) AMB'SE LANFEAR,
B. FALLON,
Agents and Attorneys of N. O., Opelousas, and Gt. Western R. R. Co.

Copy.

LONDON, 16 *November*, 1853.

Messrs. Thompson and Foreman, Dyer's Hall Wharf:

GENTLEMEN: Annexed, we hand you letter from Mr. Lanfear and Mr. Fallon relative to the shipment of the railway iron to New Orleans. Bearing reference to the conversation which Mr. Forman had with the writer, it is understood that we pay dock dues on the iron at Newport, when the freight is under 25s, 5 p. cent, so that, adding the dock dues to the freight, we are not paying more than our contract rate.

Faithfully yours,
(Si'd) W. S. LINDSAY & CO.

Endorsed: Dated 12 Septr., 1853.—3,060.

Agreement between Messrs. W. S. Lindsay & Co. and the New Orleans, Opelousas, and Great Western Railroad Co. Plffs, No. 1.

New Orleans contract.

Charters	£11,000
Insurance	2,800
	1,800
	15,600

5 Circuit court of the United States, sixth judicial circuit and eastern district of Louisiana.

CLERK'S OFFICE.

I certify the foregoing to be true and correct copies of the originals found amongst the record in the case of W. S. Lindsay & Co. *vs.* New Orleans, Opelousas and Great Western Railroad Company, No. 3,060 of the docket of said court.

Witness my hand and seal of said court, at New Orleans, this 12th day of September, A. D., 1866.

[SEAL.] CHS. CLAIBORNE, *Clerk.*

[Rev. stamp.]

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Supreme Court of the United States.

THE NEW ORLEANS, OPELOUSAS, AND GREAT WESTERN RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

W. S. LINDSAY & CO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF FOR DEFENDANTS IN ERROR.

McGILL & WITHEROW, Printers and Stereotypers, 366 E Street.

Supreme Court of the United States.

THE NEW ORLEANS, OPELOUSAS, AND GREAT WESTERN RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

W. S. LINDSAY & CO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF FOR DEFENDANTS IN ERROR.

This suit was instituted in the Circuit Court of the United States for the Eastern District of Louisiana. Though a case at law, the jury was waived according to a practice very usual in Louisiana, and the case was argued before and submitted to the court alone (8.)

The court made a statement of the case, which statement is considered by this court in the nature of a special verdict. (Cuculler *vs.* Emmerling, 22 How., 83.) But a small portion of the evidence comes up in the record. There is no bill of exceptions in the case; we must, therefore, take the facts as stated by the court (9,) and the only inquiry still open is whether the conclusions drawn from the facts are correct.

It thus appears that the parties made an agreement at London, through their avowed representatives, on the 12th of September, 1853, by which the defendants in error, shipbrokers at London, engaged to furnish, when required, freightage to Algiers, on the Mississippi river, opposite New Orleans, for all the rails which Messrs. Guest & Co. and Thompson & Foreman were under engagement to ship from Cardiff, in Wales, to New Orleans, to the plaintiffs in error,

who agreed to pay, on delivery of said rails at Algiers, freight for the same at the rate of twenty-five shillings sterling per ton of 2240 pounds, with five per cent. primage, without regard to the freights stipulated in the bills of lading, the pound sterling to be estimated at $4 80.

Under this contract the defendants transported a great quantity of rails to New Orleans; the plaintiffs in error paid the freight stipulated in the bills of lading, and this left the plaintiffs in error in debt to the defendants in the sum of £3,924 15*s.* 8*d.*, according to the account rendered by them and received by the plaintiffs, and dated the 15th of May, 1857.

None of these facts or accounts are disputed by the plaintiffs in error. But they contend in their answer that part of the rails were delivered at a later period than was intended, and were delivered at New Orleans instead of Algiers, on the opposite side of the river, where their railroad going west commences, and where they had their own warehouses—which deviation from the contract exposed them to expense in transporting the rails from New Orleans to Algiers, and caused to them damages in the sum of $28,000, which they pleaded in reconvention and as an offset, claiming judgment for the difference.

The Circuit Court found that the delay in transporting part of the iron was occasioned by the great demand for vessels during the Crimean war, (10); that the defendants in error had agreed to deduct from their claim £800 on account of this delay; that the expense of transporting the rails from New Orleans to Algiers was also a just charge against the defendants in error, but that the plaintiffs in error were entitled to no other deduction under their claim for damages; because the retarded delivery of the iron was not a disadvantage but an advantage to them. They had more iron on hand than they could use under these circumstances; they had contracted for more iron than they had any use for; and they even succeeded in rescinding their contract for a portion of the iron that had been shipped to them, because they could neither use nor sell it to advantage, (10.)

Under these circumstances the Circuit Court gave judgment in favor of the original plaintiffs, now defendants in error, for the amount of their account, $18 836 96 with interest, to be credited with the £800 offered by the defendants in error for the delay in the delivery of the iron, and the expense of transporting some part of the iron from

New Orleans to Algiers, in all $11,449 07, (18.) This is the judgment which the plaintiffs in error desire this court to review.

The facts here stated which, upon this record, can neither be contested nor even disputed, show no error in the judgment, unless the plaintiffs in error can prove, as they attempted in the court below, that they are entitled to the prescription of one or three years.

The plea of the prescription of one year is based on art. 3,499 of the Civil Code of Louisiana; which declares that "actions for the payment of freight of ships and other vessels, the wages of officers, sailors, and others of the crew, are prescribed by one year." This case is certainly quite different from that of a ship-owner or captain contracting for the freight of goods shipped by his vessel. The defendants in error are ship-brokers; they bound themselves to provide vessels to transport a large quantity of iron from Cardiff, in Wales, to New Orleans, an obligation which the iron-masters probably were not able or willing to assume. It might not have been possible for the iron-masters or the agents of the plaintiffs in error to find a sufficient number of vessels for this purpose. The record does not, and could not, disclose what inducements Lindsay & Co. held out to vessels to call at an out-of-the-way port for this iron. It may only have been possible for large ship-brokers to influence such a number of vessels to undertake this business. So, no doubt, the plaintiffs in error thought when they made the contract of 1853. It was, in short, a legitimate commercial undertaking on the part of the defendants in error, who thought that, owing to their position, they could undertake such a duty with advantage, and were willing to run the risk of it. This is very different from the case of a captain of a vessel who agrees to take freight for one trip at a fixed price. A contract for a fixed freight, such as is contemplated by art. 3,499 of the civil code of Louisiana, is evidenced by a bill of lading, and not by an agreement extending over years and involving the employment of many vessels, like that upon which this suit was brought. It is therefore very clear that that article is not applicable to the present case.

And it is equally clear that the act of the Legislature of Louisiana, which limits actions upon open accounts to three years, is not applicable to this case. (Acts of Louisiana of 1852, p. 90, Revised Statutes, 82.) The defendants in error

rendered their account to the plaintiffs in erro[illegible] in May, 1857 (9). It never was contested, and is not now, [illegible]ut its settlement was delayed by the counter-claim of th[illegible] plaintiffs in error, in a great measure allowed by the ju[illegible]gment now appealed from. While this controversy was pen[illegible], no objection to the correctness of that account was made, nor is there now such an objection made. It was not an open account; but an *admitted* account, which it was attempted to extinguish by a counter-claim.

In the case of the New Orleans, Jackson, and Great Northern Railroad Company *vs.* Estlin, 12 Annual (Louisiana) Reports, 184, the defendant was sued for the unpaid balance of his subscription to the stock, and pleaded the prescription of three years, contending that he was sued upon an open account. The court said: "The defendant was not sued upon an open account. The demand is based upon an express and written contract." In Cooper *vs.* Harrison, (12 An., 631,) an agent was sued for the price of land sold by him for his principal during a number of years. The prescription of three years of actions upon open accounts having been pleaded under the statute of 1852, the court said, "We are of opinion that the accounts due by an agent for the selling of lands cannot be considered as embraced in the sense of the statute in the words 'open accounts.' And as they are not enumerated in the articles in the Civil Code on the prescription of one, three, and five years, they are consequently subject to that of ten years."

Prescription is interrupted by the acknowledgment of the creditor's right. (See 2 Hennen's Dig., 1,222, and the numerous cases there collected.) Such acknowledgments most certainly were shown in the evidence, for the court in its statement of facts says, (p. 11,) "The court upon consideration of the contract between the parties, the account rendered in May, 1857, by the plaintiffs to the defendants, the letters between the plaintiffs and defendants relative thereto, and the accounts offered in evidence, as made out by the defendants, giving a credit to the plaintiffs for the amount of their account, and the statute of the State prescribing open accounts in three years, overrule the prescription of three years."

No part of the evidence mentioned in the above part of the statement of the Circuit Court is in the record. This court can, therefore, not examine whether the circuit court drew correct conclusions from that evidence or not, and is

bound to assume that the evidence showed sufficient grounds to repel the prescription of three years.

It seems therefore not doubtful that the judgment of the Circuit Court must be approved.

Respectfully submitted,

LOUIS JANIN,

Of Counsel for Defendants in Error.

Supreme Court of the United States.

DECEMBER TERM, 1866.

No. 36.

THE NEW ORLEANS, OPELOUSAS, AND GREAT WESTERN R. R. CO., PLAINTIFF IN ERROR,

vs.

W. L. LINDSAY, ET AL., DEFENDANTS IN ERROR.

This cause comes up by writ of error to the United States Circuit Court for the eastern district of Louisiana.

In that court Lindsay & Co. brought a suit by petition against the Railroad Company, to recover moneys due them for services performed under a parole agreement in writing, by which, as they alleged, the company, in consideration of freightage to be furnished from England to Algiers, opposite New Orleans, Louisiana, for certain iron, agreed to pay a certain price per ton for all iron so delivered. And they averred the performance of that agreement, and claimed the amount due by its terms. They also prayed for general relief. (Record, p. 1.)

The defendants, in their answer, denied the performance of the contract by the petitioners; they also set up a reconventional demand for damages by reason of the non-performance of the contract, and they also pleaded the statute of limitations. (Record, p. 4.)

The cause coming on for trial, a jury was waived, and the

cause was tried by the court, (Record, p. 8,) who found the facts specially, and made "a statement of case" a part of the record, (Record, p. 9,) and upon the facts so found gave judgment for the plaintiffs. (Record, p. 16.)

I.

A preliminary question is, whether the record sufficiently presents a case of which this Court will take jurisdiction.

The finding of the court has all the legal qualities of a special verdict. It is in form and substance the authoritative ascertainment of the facts by the court, according to the law of the forum. "It is a statement of the ultimate facts or propositions which the evidence is intended to establish," and not the evidence on which these facts are supposed to rest, (Burr *vs.* Des Moines Co., 1 Wall, 102,) and the plaintiff in error is now to show that the case thus specially found and stated does not warrant the judgment.

THE CASE.

By an agreement, made the 12th of September, 1853, between Lindsay & Co. and the Railroad Company, Lindsay & Co. agreed "to furnish, when required, freightage to Algiers, opposite New Orleans," for all the rails which certain manufacturers had agreed to deliver, and the Railroad Company engaged "to pay, on delivery of the said rails at Algiers," freight at the rate of twenty-five shillings per ton. (Statement of Case, par. 2, Record, p. 9, Contract, Return to *Certiorari*, p. 2.)

The time within which the freightage was to be furnished was extended and limited, by a subsequent agreement, to the 31st of December, 1854. (Statement of Case, Record, p. 10.)

The entire quantity of rails to be shipped appears to have been twelve thousand and thirteen tons; respecting four thousand tons of which no question was raised; but as to the other eight thousand tons, which were to be delivered by Thompson & Foreman, the manufacturers, between November 1, 1853, and April 1, 1854, (Statement of Case, Record, par. 3, Record, p. 9,) the court finds that a quantity was not freighted to Algiers, but to New Orleans, "in violation of the terms of the agreement. (Statement, par. 10, Record, p. 10.) This quantity was two thousand and two and three-fourths tons. Clerk's Report on Reference, Record, p. 12.)

Of the same eight thousand tons, moreover, freightage for no more than three thousand and sixty-eight tons was supplied prior to December 31, 1854. Freightage for the remaining four thousand nine hundred and thirty-two was not furnished until after December 31, 1854, viz: between January 6 and April 15, 1855. (Statement, par. 5, Record, p. 9.) And it does not appear that they were sent to Algiers, but only arrived at New Orleans. (*Id*, par. 7, Record, p. 10.)

The Railroad Company refused to receive the rails shipped after the 31st of December, 1854, and the manufacturers resumed possession. (Statement, par. 7, Record p. 10.)

The furnishing of the freight was delayed by Lindsay & Co. purposely and for their own advantage, because freights were high when the rails were ready for shipment, and they waited for a fall, which at length occurred, and they were thus enabled to furnish the freight at much less than they were to receive from the Railroad Company. (Statement, par. 9, Record, p. 10).

THE JUDGMENT.

Upon these facts, and others which we suppose to be wholly immaterial, the court gave judgment in favor of the plaintiff below (Lindsay & Co.) "for the whole amount of freightage, at the rates specified in the contract," allowing certain credits, for money agreed to be credited by the plaintiff, for money paid on account by the defendants and for expenses, actual and estimated, of transferring the two thousand and two and three-fourths tons of rails from New Orleans to Algiers. (*Statement*, par. 13, Record, p. 11; *Judgment*, Record, p. 16.)

This was a recovery upon the express contract declared upon, as will be seen by reference to the petition and subsequent proceedings.

The plaintiff below in the petition sets forth the express contract: they averred "that in pursuance of the aforesaid contract" they furnished freightage, and that "the balance of freight upon said rails due [them] *under the contract aforesaid*" was $18,838 98, as by their account annexed, with interest from May 15, 1857. (Petition, Record, p. 1.)

The court determined that the law and the facts were in favor of the plaintiff, and directed the clerk "to make up an account, allowing the plaintiff for the whole amount of freight at the rates specified in the contract."

And upon the clerk's report being filed, in which was credited the said sum of $18,838 98, "as per account,"

(Record, p. 12,) the court gave judgment for the sum of $18,838 98, with interest from May 15, 1857, being the identical sum and interest claimed in the petition as due "under the [express] contract aforesaid."

II.

ERRORS ASSIGNED.

The court having found as matter of fact that the plaintiffs below had failed to perform the express agreement on their part, by not furnishing freightage to Algiers for a large portion of the rails, and by not furnishing freightage within the time agreed—

The court erred in allowing the plaintiffs below to recover upon the express agreement, when it was found that they had not performed it. It is a settled principle of law, that a party cannot recover upon a contract without proving performance of all conditions precedent, and their performance within the limited time, when a time is limited.

Slater *vs.* Emerson, 19, How. 229.

This is a rule not of pleading or practice, but one founded in the nature of the subject.

It is true, the court found that the defendants had not proved "any special damage" by the delay, (Statement, par. 8, Record, p. 10;) but under this issue they were not bound to prove any damage, special or other. To require it was to shift the burden of proof, and relieve the plaintiffs from the exigencies of their own case.

III.

AS TO THE PRAYER FOR GENERAL RELIEF.

But it may be answered, that the petition contains a prayer for general relief. This at most can be regarded only as equivalent to the common counts in *indebitatus assumpsit*. And we agree that in the civil law, as well as at common law, a recovery may be had, although there be a failure to prove performance of the special contract, if the defendant have derived any benefit in the premises. But such recovery can only be *ex equo ex bono*, and undeniably must be founded on some proof tending to show some service performed and accepted, other than that stipulated in the contract, and what the plaintiff reasonably deserved to have from the de-

fendant therefor. The objection here is, that all such proof is absolutely wanting. The court does not find that the defendant below derived any benefit from the services of the plaintiff, or what was the value of the service rendered, or that it was of any value.

IV.

AS TO THE PLEA OF PRESCRIPTION.

The defendant below pleaded the prescription of one year, under art. 3499 of the Civil Code, which provides that actions "for the payment of the freight of ships and other vessels * * * are prescribed by one year."

Upon this point the court ruled, "that this contract is not a contract for the payment of freight of ships and other vessels, within the 3499th article of the Civil Code."

In the absence of any explanation, it may be assumed that the court proceeded on the ground that the special contract was in the nature of a brokerage contract, the plaintiffs below being middle-men between the defendant and the shipowners. But we have seen that the plaintiffs wholly failed to make any case upon the special contract; and if they could recover at all, must do so upon the implied contract arising out of the service performed by them, to wit: the transportation of the goods. In other words, it was an implied contract for the freight of ships merely, which arose directly between the parties to the suit, to the exclusion of all third persons, and consequently was within the letter as well as the spirit of the article of the Civil Code above cited.

As to the prescription of three years, which was also relied on by the defendant below and was overruled by the court, inasmuch as the special case stated in the record does not set forth the facts upon which the court founded its conclusion, its correctness cannot be reviewed now.

CONCLUSION.

It is submitted that the judgment should be reversed.

J. M. CARLISLE,
JNO. D. McPHERSON.
For Plaintiff in Error.